A

LEE KWAN WOH

v.

PP

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
GOPAL SRI RAM FCJ
[CRIMINAL APPEAL NO: 05-10-2008(A)]

C

31 JULY 2009
[2009] CLJ JT(3)

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Right*

D *of accused to fair trial - Whether accused deprived of right - Submission of no case at close of prosecution's case - Judicial appreciation of evidence - Miscarriage of justice - Federal Constitution, art. 5(1) - Criminal Procedure Code, s. 180(1)*

CONSTITUTIONAL LAW: *Fundamental liberties - Right to fair trial*

E *- Whether accused deprived of right - Submission of no case at close of prosecution's case - Federal Constitution, art. 5(1) - Criminal Procedure Code, s. 180(1)*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case -*

F *Right of accused to fair trial - Whether accused deprived of right - Submission of no case at close of prosecution's case - Federal Constitution, art. 5(1) - Criminal Procedure Code, s. 180(1)*

CRIMINAL PROCEDURE: *Accused - Right to fair trial - Whether*

G *accused deprived of right - Submission of no case at close of prosecution's case - Federal Constitution, art. 5(1) - Criminal Procedure Code, s. 180(1)*

EVIDENCE: *Judge - Failure to judicially appreciate evidence -*

H *Maximum or positive evaluation of relevant evidence - Miscarriage of justice*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Whether accused ought to be acquitted - Judicial appreciation of evidence - Miscarriage of justice*

I

The appellant was convicted by the High Court for trafficking 420 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and sentenced to death. He appealed to the Court of Appeal, which affirmed the High Court's decision. Hence, the present appeal to this court. The appellant submitted two grounds of complaint. The first ground was the trial judge's ruling that he did not wish to hear submissions as he was satisfied that the prosecution had made out a *prima facie* case as required by s. 180(1) of the Criminal Procedure Code. It was averred that the appellant had a constitutionally guaranteed right to a fair procedure by virtue of art. 5(1) of the Federal Constitution ('FC'), and that the judge's ruling had violated this right. The second ground was that the judge had failed to judicially appreciate the evidence, thereby misdirecting himself and occasioning a miscarriage of justice.

Held (allowing the appeal; quashing the appellant's conviction and setting aside the sentence)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) It is a fundamental right guaranteed by art. 5(1) of the FC that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance. Whether an impugned State action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. (para 18)

(2) The constitutionally guaranteed right of an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case. It is a right that he may waive, but he cannot be deprived of it. Unfortunately, that was what happened in the instant case. The accused accordingly did not have a fair trial and art. 5(1) of the FC was violated. He was entitled to have his conviction set aside on this ground. A trial court must, at the close of the prosecution's case, invite submissions from an accused. It is

A then open to the accused to say that he does not wish to make a submission. But if he does not make that election, he must be heard. It is, however, open to the court, after it has heard those submissions, to reject them and call for the defence without affording the prosecution a right to reply. B This course does no harm to the prosecution. But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him the opportunity to make a submission of no case. *PP v. Choo Chuan Wang* (foll); *PP v. Parnaby* (ovrd); *PP v. Chong Boo See* C (ovrd); *PP v. Wong Kok Wah* (ovrd). (para 19)

(3) It was plain, on the facts of this case, that a reasonable tribunal properly directing itself on the applicable law and judicially appreciating the evidence would have acquitted the D appellant at the close of the prosecution's case. The judge's failure to undertake a maximum or positive evaluation of the relevant evidence had resulted in a substantial miscarriage of justice. (para 27)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah disabit oleh Mahkamah Tinggi kerana mengedar 420 gram kanabis, suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dan dikenakan hukuman mati. Beliau merayu ke Mahkamah Rayuan, yang mengesahkan keputusan Mahkamah F Tinggi. Oleh yang demikian, rayuan semasa ke mahkamah ini. Perayu menghujah dua alasan aduan. Alasan yang pertama ialah perintah hakim perbicaraan bahawa beliau tidak ingin dengar penghujahan-penghujahan kerana beliau berpuashati bahawa pendakwaan telah membuktikan satu kes *prima facie* seperti yang G diperlukan oleh s. 180(1) Kanun Acara Jenayah. Ia telah dikatakan bahawa perayu mempunyai suatu hak bagi prosedur yang adil yang telah dijamin oleh perlembagaan mengikuti Perkara 5(1) Perlembagaan Persekutuan ('PP'), dan bahawa perintah hakim telah melanggar hak ini. Alasan kedua ialah bahawa hakim telah H gagal menimbangkan keterangan secara kehakiman, dan dengan itu telah menyalaharahkan dirinya dan menyebabkan sesuatu salah laksana keadilan.

I

Diputuskan (membenarkan rayuan; membatalkan sabitan perayu dan mengenepikan hukuman yang dikenakan)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Ia adalah satu hak asasi yang dijamin oleh Perkara 5(1) PP bahawa nyawa seseorang (dalam ertinya yang paling luas) atau kebebasan dirinya (dalam ertinya yang paling luas) tidak boleh dilucutkan kecuali mengikut tindakan Kerajaan yang adil dalam kedua-kedua prosedur dan substans. Kalau satu tindakan Kerajaan yang disoalkan itu adalah adil secara prosedur atau substantif mesti bergantung kepada pola fakta setiap kes. Walau bagaimanapun, apabila prinsip itu digunakan untuk suatu kes jenayah, apa yang dimaksudkan olehnya ialah bahawa seseorang tertuduh mempunyai hak yang dijamin oleh perlembagaan untuk menerima satu perbicaraan adil oleh satu tribunal saksama dan untuk mendapat satu keputusan yang adil atas fakta-fakta. Jikalau ada apa-apa pelanggaran mana-mana hak-hak ini, tertuduh berhak dibebaskan.

(2) Hak seorang tertuduh untuk mendapat satu perbicaraan adil yang dijamin oleh perlembagaan termasuk hak beliau untuk membuat satu penghujahan tiada kes pada penghujung kes pendakwaan. Ia adalah satu hak yang beliau boleh mengenepikan, tetapi ia tidak boleh dilucutkan dari beliau. Malangnya, itulah yang berlaku dalam kes semasa. Tertuduh oleh itu tidak mendapat satu perbicaraan yang adil dan Perkara 5(1) PP telah dilanggar. Beliau berhak untuk mendapat satu pengenepian sabitannya atas alasan ini. Sesuatu mahkamah perbicaraan mesti, pada penghujung kes pendakwaan, meminta penghujahan daripada seorang tertuduh. Ia kemudiannya terbuka bagi tertuduh untuk mengatakan bahawa beliau tidak ingin membuat satu hujahan. Tetapi jika beliau tidak membuat pilihan itu, beliau mesti didengar. Ia adalah, walaupun begitu, terbuka bagi mahkamah, selepas ia telah mendengar penghujahan-penghujahan itu, untuk menolaknya dan memanggil untuk pembelaan tanpa memberi pendakwaan hak untuk menjawab. Jalan ini tidak mengapa-apakan pendakwaan. Tetapi apa yang mahkamah perbicaraan tidak boleh melakukan di sisi undang-undang ialah untuk melucutkan hak seorang tertuduh yang telah dijamin oleh perlembagaan untuk membuat satu penghujahan tiada kes. *PP v. Choo Chuan Wang* (diikuti); *PP v. Parnaby* (ditolak); *PP v. Chong Boo See* (ditolak); *PP v. Wong Kok Wah* (ditolak).

(3) Ia adalah jelas, atas fakta-fakta kes ini, bahawa suatu tribunal yang munasabah yang mengarahkan dirinya atas undang-undang yang harus digunakan dan yang menimbangkan keterangan yang ada akan membebaskan perayu pada penghujung kes pendakwaan. Kegagalan hakim untuk membuat satu penimbangan maksima atau positif keterangan yang relevan telah mengakibatkan suatu salah laksana keadilan yang substantif.

Case(s) referred to:

AK Gopalan v. State of Madras AIR [1950] 27 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Barat Estates Sdn Bhd & Anor v. Parawakan Subramaniam & Ors [2000] 3 CLJ 625 CA ***(refd)***
Boyce v. The Queen [2004] UKPC 32 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 ***(refd)***
Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 (refd)
Lake v. Lake [1955] P 336 ***(refd)***
Leung Kwok Hung v. The Hong Kong Special Administrative Region [2005] 887 HKCU 1 ***(refd)***
Loh Wai Kong v. Government of Malaysia [1978] 2 MLJ 175 ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 1 LNS 65 ***(not foll)***
Krishna Murthy v. Abdul Subban [1965] 1 Cr LJ 565 ***(refd)***
Maneka Gandhi v. Union of India AIR [1978] SC 597 ***(refd)***
Mohamed Kasdi v. PP [1969] 1 MLJ 135 ***(refd)***
Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
Om Kumar v. Union of India AIR [2000] SC 3689 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(foll)***
Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(refd)***
PP v. Chong Boo See [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 606 ***(ovrd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(foll)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843; [2003] CLJ JT3 FC ***(refd)***

PP v. Lim Ah Bek [1989] 2 CLJ 1090; [1989] 2 CLJ (Rep) 391 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. H Parnaby [1953] 1 LNS 73 ***(ovrd)***
PP v. Wong Kok Wah [2000] 1 CLJ 217 CA ***(ovrd)***
Prince Pinder v. The Queen [2002] UKPC 46 ***(refd)***
R v. Lord Chancellor, ex p Witham [1997] 2 All ER 779 ***(refd)***
Re Tan Boon Liat [1977] 1 LNS 110 ***(foll)***
Ratten v. The Queen [1974] 131 CLR 510 ***(refd)***
Sambhu Nath Sarkar v. State of West Bengal AIR [1973] SC 1425 ***(refd)***
Hinds v. The Queen [1976] 1 All ER 353 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 92
Criminal Procedure Code, ss. 180(1), 422
Dangerous Drugs Act 1952, s. 39B(1)(a)
Federal Constitution, arts. 5(1), 8(1)
Interpretation Acts 1948 and 1967, s. 66

Constitution of the Republic of Singapore [Sing], arts. 9, 12

For the appellant - Hisham Teh Poh Teik (Gobind Singh Deo with him); M/s Teh Poh Teik & Co
For the respondent - Saiful Edris Zainuddin; AG's Chambers

[Appeal from Court of Appeal; Criminal Appeal No: A-05-49-2002]

[Editor's note: For the Court of Appeal judgment, please see Lee Kwan Woh v. PP [2008] 4 CLJ 133.]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram FCJ:

[1] The appellant was convicted by the High Court at Ipoh for trafficking 420 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. He was sentenced to death. He appealed to the Court of Appeal which affirmed the High Court's decision. He then appealed to us. We heard this appeal on 28 July 2009 and allowed it. The appellant's conviction was quashed, his sentence was set aside and he was ordered to be set at liberty forthwith. We now give reasons for our decision.

[2] The gist of the prosecution's case is this. On 4 April 2000 at about 4pm, PW4 (Inspector Hilimi bin Ahmad), acting on information received laid an ambush at the scene of the incident, namely, Jalan Selasar 10, Taman Ipoh Jaya, Ipoh. PW4 was accompanied by several police personnel, including PW8 (Detective Lance Corporal Magendran). At about that time, the appellant arrived at the scene. He was driving motor car ABA 6363 which was established in evidence to belong to his brother PW5. He parked the car adjacent to house No. 52. He emerged from the car, carrying a white plastic bag exh. P13. He was almost immediately accosted by PW4 and PW8. PW4 identified himself as a police officer. The appellant then attempted to flee. He was overpowered and placed under arrest. PW4 found exh. P13 to contain a substance which on subsequent chemical examination was found to be 420 grams of cannabis. The appellant was then charged for trafficking that drug.

[3] In the course of the prosecution case it was established that on 4 April 2000, the appellant and his family had gone to the gravesites of their relatives at Jalan Tambun, Ipoh and then at Tanjong Tualang as it was Cheng Beng or All Souls Day. Later, the family returned home. PW5 and the appellant then cleared PW5's car of the paraphernalia that had been taken to the gravesites. The appellant asked for PW5's permission to use the latter's car to visit friends. PW5 agreed but asked that he be dropped off at his place of work. The appellant drove the car with PW5 in it. There is evidence on record to show that during the journey PW5 did not see P13 in his car. After having dropped off PW5, the appellant proceeded to the scene.

[4] At the close of the prosecution case, the learned trial judge ruled that he did not wish to hear submissions as he was satisfied that the prosecution had made out a *prima facie* case as required by s. 180(1) of the Criminal Procedure Code. This ruling formed the first ground of complaint before us. The second complaint is that the learned trial judge failed to judicially appreciate the evidence thereby misdirecting himself which misdirection has occasioned a miscarriage of justice.

[5] Taking the first ground, the issue here is whether a court acting under s. 180(1) is entitled – to quote from the subsection – "consider whether the prosecution has made out a *prima facie* case against the accused" without affording the accused an

opportunity to make a submission of no case. No doubt the subsection does not expressly confer such a right upon an accused. However, counsel submitted that his client has a constitutionally guaranteed right to a fair procedure by virtue of art. 5(1) of the Federal Constitution. He argued that this right had been violated by reason of the learned judge's ruling. This is an important submission and calls for careful consideration.

[6] The first step in the inquiry is to ascertain whether there is such a constitutionally guaranteed right as asserted by the appellant. As Laws J said in *R v. Lord Chancellor, ex p Witham* [1997] 2 All ER 779:

> Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation the right claimed exists at all.

Whether the right claimed in the instant case exists at all turns on the interpretation of art. 5(1) which provides that: "No person shall be deprived of his life or personal liberty, save in accordance with law." Before we embark upon that interpretive exercise, it is important to bear in mind the principles that govern the interpretation of the Federal Constitution.

[7] In the first place, the Federal Constitution is the supreme law of the Federation. Though by definition it is a written law (see, s. 66 of the Consolidated Interpretation Acts of 1948 & 1967) it is not an ordinary statute. Hence, it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes. Indeed, it would be misleading to do so. As Lord Diplock said in *Hinds v. The Queen* [1976] 1 All ER 353, at p 359:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading …

We must here say that the contrary view expressed by Mukherjee J in *AK Gopalan v. State of Madras* AIR [1950] 27, 96 and by the former Federal Court in *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22 (where the court said: "It is well-settled that the meaning of words used in any portion of a statute – and

A the same principle applies to a constitution – depends on the context in which they are placed …" (emphasis added) is clearly wrong and should no longer be followed. As for *Gopalan*'s case, it was for all practical purposes overruled by the Indian Supreme Court in *Sambhu Nath Sarkar v. State of West Bengal* AIR [1973] B SC 1425. What remained of Gopalan was swept away by the decision in *Maneka Gandhi v. Union of India* AIR [1978] SC 597. And as for the decision in *Loh Wai Kong*, it was a case in which the Government of Malaysia succeeded before the High Court. Nevertheless, it purported to appeal against certain observations C made by Gunn Chit Tuan J (later Chief Justice of Malaya) in the course of his judgment. As the law then stood and indeed as it still stands even today, a litigant who has succeeded at first instance has no right of appeal against a decision given wholly in his or her favour. See, *Lake v. Lake* [1955] P 336. The former D Federal Court therefore had no jurisdiction to hear the matter. Yet it entertained the appeal and purported to allow it when the final order of the High Court was in the appellant's favour. Hence, the views expressed in *Loh Wai Kong* are worthless as precedent.

E **[8]** In the second place, the Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those F provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same G way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as "life" and "personal liberty" in art. 5(1). There are several authorities in H support of this view. We will refer to some of them. And we begin at home with the case of *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, where Raja Azlan Shah Ag LP (as His Royal Highness then was) said:

I

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher*) [1973] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Navis and Anguilla v. Reynolds* [1979] 3 All ER 129, p 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[9] The next case is *Boyce v. The Queen* [2004] UKPC 32, where Lord Hoffmann said

Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts – what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment – had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.

[10] The courts of Hong Kong have adopted a similar approach when interpreting their Basic Law. In *Leung Kwok Hung v. The Hong Kong Special Administrative Region* [2005] 887 HKCU 1, Li CJ when delivering the unanimous judgment of the Court of Final Appeal said:

> It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v. Director of Immigration* [1999] 2 HKCFAR 4 at 28-9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v. Director of Immigration* [2002] 5 HKCFAR 480 at para. 24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. *Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.* (emphasis added).

[11] We return home to end our citation of the authorities. In the recent case of *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521, this court in the judgment of Hashim Yusoff FCJ approved, *inter alia*, the following passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19:

> The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

More importantly, the majority of this court in *Badan Peguam Malaysia* also accepted the omnipresence of art. 8(1) of the Constitution when interpreting its other provisions. And that brings us to the next principle of interpretation.

[12] The third principle is this. A court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly referred to as "the humanising and all pervading provisions of art. 8(1)" (see, *Barat Estates Sdn Bhd & Anor v. Parawakan a/l Subramaniam & Ors* [2000] 3 CLJ 625.) That article

reads: "All persons are equal before the law and entitled to the equal protection of the law." In *Badan Peguam Malaysia* this court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia*:

> When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

The effect of art. 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of State action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed. See, *Om Kumar v. Union of India* AIR [2000] SC 3689.

[13] The fourth principle of constitutional interpretation is this. Whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively. As Lord Nicholls of Birkenhead and Lord Hope of Craig Head in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46 said in their joint dissent:

> It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions': see *The State v. Petrus* [1985] LRC (Const) 699, p 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughess* [2002] 2 AC 259, p 277 part 35.

This passage was quoted with approval by the majority of this court in the *Badan Peguam Malaysia* case. So much for the interpretive principles.

[14] When art. 5(1) is read prismatically and in the light of art. 8(1), the concepts of "life" and "personal liberty" housed in the former are found to contain in them other rights. Thus, "life" means more than mere animal existence and includes such rights as livelihood and the quality of life (see *Tan Tek Seng*'s case). And "personal liberty" includes other rights such as the right to travel abroad. See, *Loh Wai Kong v. Government of Malaysia* [1978] 2 MLJ 175, where Gunn Chit Tuan J said that "personal liberty" includes "liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires."

[15] We next move to consider the expression "according to law" appearing in art. 5(1). It is counsel's submission that the expression "law" includes procedural law. In support he cited the judgment of Lee Hun Hoe CJ (Borneo) in *Re Tan Boon Liat* [1977] 1 LNS 110 where the learned Chief Justice held that:

> … in accordance with law' in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of Article 5.

With respect we agree. It is equally our misfortune that we find ourselves in disagreement with the contrary view expressed by Suffian LP in the same case and in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 1 LNS 65. In our judgment what art. 5(1) strikes down is all forms of State action that deprive either life or personal liberty bearing a meaning of the widest amplitude in contravention of substantive or procedural law.

[16] We next turn to consider the expression "law". It is defined by art. 160(2) of the Constitution as follows:

> 'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

"Common law" is defined by s. 66 of the Consolidated Interpretation Acts of 1948 & 1967 as follows:

> 'common law' means the common law of England

We resort to s. 66 in Part II of the Consolidated Acts as it expressly states that it applies to "every written law as hereinafter defined, and in all public documents enacted, made or issued before or after 31 January 1948". Since the Constitution is a written law that came into force in 1957, that is to say, after 31 January 1948, it is Part II that must be utilised to interpret the supreme law. The rule of law forms part and parcel of the common law of England. And the rules of natural justice which form part of the wider concept of "procedural irregularity" formulated by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 are an integral part of the rule of law. Accordingly, the rule of law in all its facets and dimensions is included in the expression "law" wherever used in the Constitution. Hence, the expression "law" in art. 5(1) includes written law and the common law of England, that is to say the rule of law and all its integral components and in both its procedural and substantive dimensions. For, it is now settled that the rule of law has both procedural and substantive dimensions. See, *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577, where at p. 606, Lord Steyn said: "The rule of law in its wider sense has procedural and substantive effect."

[17] We also find support for the view we have expressed from the judgment of Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, where, when dealing with arts. 9 and 12 of the Singapore Constitution which are identical to arts. 5 and 8 respectively he said:

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers

A of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

B It is clear from this passage that the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of arts. 5(1) and 8(1). In short, procedural fairness is incorporated in these two articles.

[18] Drawing the threads together, it is clear from the authorities C that it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance. Whether an impugned State action is substantively or procedurally D fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused E is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he then was) in *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ F 1242; [1992] 3 CLJ (Rep) 329, where he held that:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an G accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid)* (*Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

H **[19]** We must consider the impact of what we have said thus far on the facts of the instant case. In our judgment, the constitutionally guaranteed right in an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case. It is a right that he or she may waive. But I he or she cannot be deprived of it. That unfortunately is what happened here. The accused accordingly did not have a fair trial

and art. 5(1) was violated. Following *Public Prosecutor v. Choo Chuan Wang* he is entitled to have his conviction set aside on this ground. We would add that the view expressed by Bellamy J in *Public Prosecutor v. H Parnaby* [1953] 1 LNS 73 that a trial court is not bound to hear submissions at the close of the prosecution case is not correct. Neither are the decisions that have followed it, namely *Public Prosecutor v. Chong Boo See* [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206 and *Public Prosecutor v. Wong Kok Wah* [2000] 1 CLJ 217. In our judgment, a trial court must, at the close of the prosecution case, invite submissions from an accused. It is then open to the accused to say that he or she does not wish to make a submission. But if he or she does not make that election, he or she must be heard. It is however open to the court, after it has heard those submissions to reject them and call for the defence without affording the prosecution a right to reply. This course does no harm to the prosecution. But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him or her of the opportunity to make a submission of no case.

[20] The violation of the appellant's art. 5(1) right to a fair trial is not, as we observed very early in this judgment, the only ground of complaint. There is also complaint made that the learned trial judge failed to judicially appreciate the evidence. And it is this ground we now turn to address.

[21] There are three important evidential points. We take the first. The appellant's case as put to the relevant prosecution witnesses was that he was not apprehended the moment he emerged from the car. He was arrested in the compound of house No. 52. PW3, the investigation officer confirmed under cross examination that the appellant had, during investigations, informed her of this fact. She however failed to investigate this allegation at all. This is a serious omission. In *Public Prosecutor v. Lim Ah Bek* [1989] 2 CLJ 1090; [1989] 2 CLJ (Rep) 391 there was a doubt whether the investigating officer in that case had investigated the defence of alibi mentioned by the accused in his cautioned statement. Based on this possible omission, Gunn Chit Tuan J (as he then was) drew an inference in favour of the accused in that case. The present case is much stronger in that there was no investigation at all. An inference in the appellant's favour ought therefore to have been drawn by the learned judge at the close

of the prosecution case. Had that been done, doubt would have been cast upon the evidence of PW4 and PW8. Unfortunately this point was missed by the learned trial judge, no doubt, because of his ruling. If he had heard the submission of no case by the appellant, he may perhaps have not acted upon the evidence of these two witnesses.

[22] The second evidential point is this. PW3 confirmed under cross examination that PW8 had informed her that earlier on the day of the appellant's arrest, at about 4am, drugs had been recovered from house No. 52 and that eight persons had been arrested in connection with that raid. The public prosecutor relies on the testimony of PW8 who in his evidence denied that such a recovery or arrest had taken place. But this overlooks the real issue. At issue was PW8's credibility. He did not in his evidence deny that he had told PW3 about the 4am raid and arrests. The fact remains that PW8 had made a previous statement to PW3 which was inconsistent with his evidence in court. This, at the very least, had the effect of rendering his evidence suspect. It most certainly required the trier of fact to approach that evidence with caution. As Ali J (later Ag LP) said in *Mohamed bin Kasdi v. Public Prosecutor* [1968] 1 LNS 78:

> No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

[23] The third evidential point relates to the issue whether the appellant was carrying exh. P13. It was accepted by PW8 that if the appellant had been carrying exh P13 in the manner demonstrated to the court by the witness, the appellant's fingerprints would appear on that exhibit. It was, however, established under PW3's cross examination that exh. P13 had been sent for fingerprinting and that the appellant's fingerprints were not on the said exhibit. The independent evidence showed that the appellant could not have been carrying exh. P13. It therefore seriously contradicted the evidence of PW4 and PW8 on a material point. Unfortunately this part of the case does not appear to have been addressed by the learned trial judge.

[24] Gathering the relevant material, the state of the prosecution evidence at the close of its case was this. There was a serious doubt whether the appellant was arrested when emerging from the car or in the compound of house No. 52. It was highly improbable that the appellant was carrying exh. P13. Hence the prosecution had failed to establish how the drug in question came to be recovered. This left a large gap in the prosecution case. On this point there is the added fact that PW8 had been contradicted on the question as to whether there had been, earlier the same day, drugs had been recovered from premises No. 52 and that eight persons had been arrested. If true, then the drug that formed the subject matter of the charge may have come from there. At the very least there was more than one inference that could fairly be drawn from the prosecution evidence. And it is settled law that in that state of affairs the inference most favourable to the appellant should have been drawn.

[25] What was required of the learned trial judge at the close of the prosecution case was to undertake a maximum or positive evaluation of all the evidence tendered at that stage. In *Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the test to be applied under s. 180 at the close of the prosecution case was stated as follows:

> This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105: *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him.

[26] In *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 this court in its judgment delivered by Augustine Paul FCJ observed as follows:

> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[27] It is plain from what we have said when discussing the evidence that a reasonable tribunal properly directing itself on the applicable law and judicially appreciating the evidence would have acquitted the appellant at the close of the prosecution case. The failure of the learned judge to undertake a maximum or positive evaluation of the evidence of PW3, PW4 and PW8 has in the present case resulted in a substantial miscarriage of justice. We are therefore unable to accept the invitation of the learned deputy public prosecutor to apply the proviso to s. 92 of the Courts of Judicature Act 1964. In this context we would refer to three authorities which are in our judgment of assistance on the way in which the proviso should be applied. The first is *Mraz v. The Queen* [1955] 93 CLR 493, where Fullagar J said:

> … every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.

[28] The second case is *Ratten v. The Queen* [1974] 131 CLR 510 at p 516 where, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

[29] The last authority is *Krishna Murthy v. Abdul Subban* [1965] 1 Cr LJ 565, 576 where Hegde J said:

> The expression 'a failure of justice has in fact occasioned thereby' found in Section 535(1), Cr. PC does not connote that the Court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the Legislature need not have introduced the conception of 'failure of justice' in sections 535 and 537, Cr. PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr. PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr. PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

Although *Krishna Murthy v. Abdul Subban* was a decision on the Indian equipollent of s. 422 of the Criminal Procedure Code, the expressions "failure of justice" and "miscarriage of justice" have the same meaning in the context of determining whether a conviction should be upheld despite a misdirection by the trial judge. See, *Public Prosecutor v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ

A 843. We would add for good measure that the misdirection or non-direction by a judge unto himself is to be treated on the same footing as a misdirection by a judge to a jury. See, *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705.

B **[30]** Before we conclude, we must add that the Court of Appeal appears to have missed the points we have made in this judgment. We are therefore unable to agree with their decision. In our judgment, quite apart from the constitutional point, the appellant's conviction was plainly unsafe having regard to the facts and
C evidence as they stood at the close of the case for the prosecution. The learned trial judge clearly erred in the way he handled the facts and that in itself is sufficient ground for the appellate interference. See, *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469.

D **[31]** For the reasons already given, the appeal was allowed, the conviction was quashed and the sentence set aside.

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